United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 76-7027

United States Court of Appeals For the Second Circuit

HARRY LEWIS,
Plaintiff.

against

TELEPROMPTER CORP.,
Defendant.

INDEPENDENT INVESTOR PROTECTIVE LEAGUE,
Plaintiff-Appellant.

against

TOUCHE ROSS & COMPANY,
Defendant-Appellee.

I. WALTON BADER,
Appellant.

against

TOUCHE ROSS & COMPANY,
Defendant-Appellee.

Appellant's Brief

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HARRY LEWIS

Plaintiff

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INDEPENDENT INVESTOR PROTECTIVE LEAGUE

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Docket No.
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Defendant-Appellee

I.WALTON BADER

Appellant

against

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APPELLANTS' BRIEF

This is an appeal, in a consolidated action pending before Judge MacMahon of the United States District Court for the Southern District of New York, from an Order of Hon. Richard Owen, a Judge of the United States District Court for the Southern District Court for the Southern District of New York, which granted Rule 37 sanctions against the plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE and its attorney I.WALTON BADER, said sanctions involving the award of costs and attorneys' fees against said parties by reason of claimed fraud having been committed against said defendant TOUCHE ROSS & COMPANY by reason of claimed service of interrogatory answers which were not in the possession of the plaintiffs' attorney at the time of such service.

The amount of such attorneys' fees have not yet been awarded by the District Court (although the said defendant TOUCHE ROSS & COMPANY claims an amount of $18,000). This appeal has been taken pursuant to the Rule enunciated in Cohen vs. Beneficial Industrial Loan Corp. 337 US 541 (1949), by reason of the fact that the District Judge made a finding that the plaintiffs' attorney had committed a fraud on the Court and counsel and recommended disciplinary action against the attorney by reason thereof.

Subsequent to the Order and Opinion of the District Court in this matter, important new evidence has been adduced which clearly explains all of the open areas in this case. This evidence is now before this Court on a Motion to Remand this appeal to the District Court for consideration of the new evidence. It is expected that the Motion to Remand will be heard and determined prior to the date of argument of this appeal. However this brief will be written on the basis of the evidence before the District Court.

APPELLANTS' POINTS

The following grounds of error are urged to support a reversal of the determination of the District Court.

1. Contrary to the position of the District Judge, the date for compliance with the Order requiring submission of further answers to interrogatories was not September 5th, 1974 but was September 9th, 1974. It is conceded by all parties that, on that date, the further answers to interrogatories were duly executed and in the possession of the plaintiffs' attorney with respect to the plaintiffs INDEPENDENT INVESTOR PROTECTIVE LEAGUE and the plaintiff RANDOLPH. Thus the dismissal by the District

Court of the action with respect to the plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE cannot be sustained.

2. Prior to the date of September 5th, 1974, the plaintiff MICHAEL was dropped from this case by the filing of an Amended Complaint which dropped his name as a party plaintiff. Thus the draft copies of interrogatory answers of MICHAEL sent to the attorneys for the defendant TOUCHE ROSS on September 5th, 1974 were mere surplusage and were immaterial.

3. It now transpires that the plaintiff MICHAEL FAGAN sent signed interrogatory answers to the plaintiffs' attorney long prior to September 5th, 1974. Thus, at the time of the mailing involved, signed copies of the said interrogatory answers were in existence and the mailing of such copies to the attorneys for the defendant TOUCHE ROSS was proper.

4. Under the substantive law of the State of New York, which is binding on this Court, no sanctions can be applied against any party unless there is prejudice to the adverse party by reason of any conduct of any other party. Prejudice having no been determined in this action by reason of the plaintiffs' conduct or the conduct of their attorney the Order of the District Court should

be reversed.

5. Prior to the determination of the District Court in this matter, Notices of Voluntary Dismissal under Rule 41 were filed by all plaintiffs in this action. Hence the Court lost jurisdiction to determine the pending motion before it and the Order issued herein is a nullity.

6. The factual findings made by the District Judge in this matter are "clearly erroneus".

7. Since there were disputed issues of fact in this case, which the Court held to be material, and found that "false statements" and "false testimony" had been given in this matter, the Seventh Amendment requires a jurty trial to be granted to the plaintiffs, since a demand for jury had been placed both in the original complaint and the amended complaint in this action.

8. In view of the fact that the District Judge used the evidence adduced at the hearing as grounds for recommending disciplinary action against the plaintiffs' attorney, and failed to inform the said attorney of the real reason for the hearing (as indicated in the Court's Opinion) the Fifth Amendment rights of the appellant BADER have been violated.

9. There has been no wilful refusal to comply with the Court's discovery Orders. Hence the imposition of sanctions by the Court in this case was improper.

FACTS

The action from which this appeal is taken, Civil Action 73 Civil 4133, has been consolidated with six other Civil Actions involved in the same Complaint and Class Status has been granted by the District Court. A lead counsel (not the undersigned) has been appointed to represent the Class and the consolidated suits are proceeding to a conclusion. The Order of Consolidation was entered on November 15th, 1974 (JA 430-435).

The original Complaint in this action (73 Civil 4133) was brought in the name of four plaintiffs. These were INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, GARY MICHAEL and MICHAEL FAGAN. Judge Griesa of the United States District Court for the Southern District of New York (to whom this case was sssigned) dismissed the original Complaint with leave to amend. The Amended Complaint (JA-249-257)dropped the said GARY MICHAEL as a party.

The defendant TOUCHE ROSS & COMPANY had, on November 1, 1973 (JA 258-262) served interrogatories to all of the plaintiffs. These were answered on July 11, 1974 (JA 263-277) but the answers were claimed to be insufficent

by the defendant TOUCHE ROSS & COMPANY. A Motion for further answers to interrogatories was then made and was granted by the Court on August 16th, 1974 as follows (JA 293).

> " Motion granted in its entirety and is to be complied with in twenty days time. So ordered."

Notice of the entry of this Order was given to the undersigned by mail by the clerk of the Court on August 16th, 1974 (JA A-10).

On February 13th, 1974 an Order was entered by Judge Owen, on consent of the plaintiffs' attorneys, that the time for the defendant TOUCHE ROSS to answer or move with respect to the Amended Complaint would be extended until 30 days after answers to the open interrogatories were served (JA 226-227).

On August 15th, 1974 letters were addressed to the individual plaintiffs RANDOLPH and FAGAN and to GARY MICHAEL asking for the information necessary to respond to the interrogatories involved.(JA 387-388). The replies were received prior to August 29th, 1974 and, on that day, draft replies were sent to the parties involved (JA 548-557).

The party RANDOLPH signed the answers involved on September 3rd, 1974 and promptly mailed them to the plaintiffs' attorney. (JA 366-369). The date of signing and mailing is

established by the affidavit of RANDOLPH (JA 605-606) and the date of receipt by the plaintiffs' attorney established by the post-office communications (JA 473 and 474).

On September 5th, 1974 MERRILL SANDS signed the answers of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE (JA 476-544) and so testified in the transcript (JA 67-68). These answers were mailed to all attorneys for the parties by SANDS (JA 68). However, the answers as mailed to the attorneys for the defendant TOUCHE ROSS did not have the jurat filled out although they did indicate that they were signed by SANDS. (JA 479).

During the afternoon of September 5th, 1974 BADER was preparing to leave for St. Louis Missouri. Before SANDS left BADER's office BADER asked him to return at 4PM to determine whether the answers of the individual plaintiffs had arrived at his office. SANDS arrived at BADER's office at about 4PM, discovered that the RANDOLPH answers had arrived, informed BADER that "The Teleprompter answers are here" (JA 76) and, without authority, mailed unconformed copies of the draft interrogatory answers to the attorneys for TOUCHE ROSS (although these were not mailed to any of the other attorneys in the case).

BADER was in St. Louis Missouri on September 6th

1974 (JA 475) and, while there, discovered that he unexpectedly would have to be in Washington DC on September 9th, 1974. He arrived in New York late on September 7th, 1974 and on September 8th, 1974 asked Sands to check his mail in the office on September 9th, 1974. Sands did so and informed him that he had received a letter from the ROSENMAN, COLIN firm. BADER expected that this referred to the failure of service of interrogatory answers of RANDOLPH and FAGAN and thus informed the Rosenman, Colin firm by telephone from the airport on September 9th, 1974 that he hoped to receive the answers and would mail them in a few days. The documentary record of this conversation (the only record in existence and taken down by a secretary of the ROSENMAN COLIN firm substantially confirms that conversation but only partially. It reads as follows: (JA 579-580)

> " Rec'd you letter about Teleprompter case. Will send you photocopies of original interrogatory answers within next few days"

On September 10th, 1974 BADER again called the ROSENMAN COLIN firm and gave a similar message to the message given September 9th, 1974. The documentary record of this conversation (also taken by a secretary of the ROSENMAN COLIN firm) reads as follows:

(JA 582)

> "Mr. Bader called. Re interrogatories. He will be sending photocopies of the original answers. He extends his apologies. He will extend your time to answer for 2 1/2 or three weeks."

A further conversation was had personally between BADER and ENO on September 10th which resulted in a meeting on September 11th, 1974 at BADER's office so that the original answers could be inspected.

On September 10th, 1974 BADER discovered that unconformed copies of the answers of RANDOLPH, MICHAEL and FAGAN had been sent to the attorneys for TOUCHE ROSS. He therefore immediately served copies of the RANDOLPH answers on all of the other attorneys but did not serve the attorneys for TOUCHE ROSS since a personal meeting was to be had on September 11th. (See JA 425.) These answers were served upon the attorneys for TOUCHE ROSS on September 11th, 1974 and filed with the Court on that date (JA 422).

A motion was also made for an extension of time to file answers to interrogatories of the plaintiff FAGAN and MICHAEL (JA 384-388A) which motion was dated September 11, 1974 [The alleged filing date of September 10th, 1974 on the papers is incorrect]. The motion was made returnable September 20th, 1974.

On September 13th, 1974 <u>after the plaintiff had</u>

already made a motion to extend time, and after the defendant TOUCHE ROSS had already received fully conformed copies of the interrogatory answers of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE and of RANDOLPH, the defendant TOUCHE ROSS made a Rule 37 motion with respect to the interrogatory answers.

Interestingly enough, TOUCHE ROSS asked, in its motion for an Order

> "* * * extending defendant's time to answer or make any motion with respect to the amended complaint until plaintiffs have fully responded to Interrogatories dated November 1, 1973 * * *"

This relief, of course, was precisely what BADER had concededly offered to the attorneys for the defendant TOUCHE ROSS on September 10th, 1974.

[It now transpires that the plaintiff MICHAEL FAGAN had, in fact, signed his answers to interrogatories on August 30th, 1974 and had mailed them promptly to the plaintiffs' attorneys, so that his answers also should have been in the plaintiffs' attorneys' possession on September 5th, 1974.]

On September 18th, 1974 the plaintiffs' attorneys received properly signed answers of the aforesaid GARY MICHAEL which were served on the attorneys for all parties on September 18th, 1974. Thus, on September 20th, 1974, at the time of the argument of these motions before Judge Owen the unconformed answers to interrogatories of RANDOLPH, MICHAEL

and FAGAN, which had been served on September 5th, 1974, were properly executed and, at that time, the attorneys for all defendants had fully conformed copies of interrogatory answers from the plaintiffs RANDOLPH and INDEPENDENT INVESTOR PROTECTIVE LEAGUE and from GARY MICHAEL. [These defendants should also have had properly signed answers from MICHAEL FAGAN but the plaintiffs were unaware of the facts at that time.]

There were statements made on the argument of the motions before Judge Owen. Judge Owen took notes on the matter (which are somewhat illegible) and which appear in the appendix as Court Exhibit S (JA 597-598) . No stenographic record of what was said during the argument before Judge Owen exists and BADER does not recall what was said. ENO claims to have carefully listened to what was said and then to have made notes after he returned to the office on what was said. (JA 210) The testimony reads as follows:

> " * * * I listened quite intently to what Mr. Bader said to your Honor, and promptly, after returning to my office that day, I dicated a memorandum of what he said. The memorandum contains not only statements of what he said but comments of mine * * *"

Judge Owen, although he made no disposition of the pending motions before him at that time, appears to have held that he would deny the motion for an extension of time and would hold a hearing to determine whether the answers of

RANDOLPH had actually been received at BADER's office on September 5th, 1974.

[Apparently, as appears from the Court's opinion, this was not the real purpose of the hearing. The Court apparently was conducting a disciplinary hearing into the professional conduct of BADER. The manner in which this was done, of course, violated all appropriate standards of due process and is in contravention of the determination of the Supreme Court of the United States in In Re Ruffalo 390 US 544 (1967). At least, this conduct on the part of the District Judge, bars him from making fact findings in this case and requires, at least, a trial before another District Judge with a jury.]

The defendant TOUCHE ROSS & COMPANY then sent plaintiffs a "Notice of Hearing" (JA 428-429). The Notice read in part as follows:

> " * * * a hearing has been directed by Hon. Richard Owen, USDJ, into the circumstances relating to the service on September 5, 1974 of purported answers by plaintiff Martin F. Randolph, Jr. to Interrogatories dated November 1, 1973 * * *"

At the commencement of the hearings the following colloquy appears:

THE COURT: And the parameters of this as you

see it are what?

MR. ENO: Well, the question that I understand we have the hearing on, your Honor, were the circumstances under which this purported answers to interrogatories of the plaintiff Randolph received.

THE COURT: Very good.

After the hearing was held the Court, after hearing the evidence presented made the Order appealed from herein.

POINT ONE

SINCE THE DATE OF COMPLIANCE WITH THE ORDER OF THE COURT IS SEPTEMBER 9th 1974 AND NOT SEPTEMBER 5th, 1974 AND SINCE BY SEPTEMBER 9th 1974 IT IS CONCEDED THAT PROPERLY SIGNED ANSWERS OF THE INDEPENDENT INVESTOR PROTECTIVE LEAGUE and RANDOLPH [AND NOW FAGAN AS WELL] WERE RECEIVED OR SHOULD HAVE BEEN RECEIVED AT THE OFFICE OF THE PLAINTIFFS' ATTORNEY, THE ANSWERS TO INTERROGATORIES WERE PROPERLY SERVED AND THE COURT'S DETERMINATION IS IMPROPER

Aside from everything else in the Court's Order appealed from herein the Court made a serious error that vitiates everything that it has done. The error was to assume that the Answers to Interrogatories of RANDOLPH and the INDEPENDENT INVESTOR PROTECTIVE LEAGUE were due on September 5th, 1974. All of the Court's conclusions flow from that fact which is incorrect.

The order was entered August 16th, 1974 and the Court simply added 20 days from that date to obtain September

5th, 1974 as the time for compliance. However the Court's Order merely sets a time of 20 days. It does not say 20 days from what. Therefore, since Notice of Entry of the Order was given by mail on August 16th, 1974 the "mail rule" applies.

Notice of entry of an Order, of course, is required in order to comply with "due process" requirements. Rule 77(d) FRCP sets forth the "notice" provisions as follows:

> " * * * Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail * * *upon each party.* * *"

Where notice of an Order is given by mail three additional days are given a party for compliance. This is set forth in Rule 6(e) FRCP reading as follows:

> "* * *Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.* * *"

Three days from September 5th, 1974 would be September 8th, 1974. But this day was a Sunday. Then Rule 6(a) FRCP applies reading in part as follows:

> " * * * The last day of the period so computed shall be included, unless it is * * *a Sunday* * *in which event the period runs until the end of the next day which is not * * a Sunday * * *"

Thus, the time for compliance with the Court's order was September 9th, 1974 and not September 5th, 1974.

There is, of course, no question that the answers of RANDOLPH were in the office of the plaintiffs' attorney on September 9th, 1974. This would be six days after mailing VIA AIR MAIL and even in these days of mail delay this time would be sufficient. (It is, at least, admitted, that on September 10th, 1974 these answers were in the office of the plaintiffs' attorney since photo-copies were admittedly mailed to all other counsel on that date.)

The only time between September 5th, 1974 and September 11th, 1974 that BADER met with SANDS was September 8th, 1974. Thus, even assuming arguendo that SANDS executed these answers on September 8th, 1974 (which, of course, is totally unsupported by the evidentiary record) the answers would still be timely.

The question of the mail delivery on September 5th, 1974 now becomes totally irrelevant and all other factual findings made by the Court also become totally irrelevant.

POINT TWO

GARY MICHAEL WAS NOT A PLAINTIFF IN IN THIS ACTION WHEN THE AMENDED COMPLAINT WAS FILED AND THEREFORE HAD NO OBLIGATION TO ANSWER INTERROGATORIES

The Amended Complaint in this action (JA 249-257) has three plaintiffs thereupon. These are INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH and MICHAEL FAGAN. The said GARY MICHAEL, who was a plaintiff in the original complaint, was not a plaintiff in the Amended Complaint.

In his affidavit in support of an Order seeking further interrogatory answers, defendant TOUCHE ROSS' counsel claimed that GARY MICHAEL was still a plaintiff in the suit because he had not been dropped by an Order pursuant to Rule 21. However, this position is not the position of this Court which permits the dropping of a party pursuant to Rule 15 and not Rule 21. In Kerr vs. Compagnie de Ultramar, 2 Cir, 250 Fed.(2nd) 860 this Court said:

> " * * The motion more properly is an amendment of the pleadings under Rule 15(a) which would result in a dismissal of the complaint against Transmar.* * *"

To the same effect is Benbow vs. Wolf, 217 Fed(2nd) 203 where the Court said:

> " * * * Since there is no harm in amending the complaint by striking out allegations as to a defendant over whom the court has no jurisdiction, the case may proceed to another trial as if originally filed against the United States alone.* * *"

In the case at Bar amendment of the Complaint was permitted, without restriction, by Judge Griesa of the United States District Court for the Southern District of New York. Plaintiffs amended their complaint by dropping the party GARY MICHAEL. [Actually the undersigned was not aware of this heretofore because of the coincidence in the names of GARY MICHAEL and MICHAEL FAGAN.] However since GARY MICHAEL was not a party on September 5th, 1974 the service of draft copies of draft copies of interrogatory answers as to him was, of course, a nullity and meaningless. Rule 33 provides merely for interrogatories to parties and to no one else.

POINT THREE

SIGNED INTERROGATORY ANSWERS OF RANDOLPH (AND NOW FAGAN) WERE IN THE MAIL ON SEPTEMBER 5th 1974 AT THE TIME OF SERVICE OF COPIES ON THE ATTORNEYS FOR TOUCHE ROSS. THEREFORE SERVICE WAS MADE AS REQUIRED BY THE ORDER OF THE COURT.

It is conceded that on September 3rd, 1974 RANDOLPH deposited signed answers to interrogatories in the mail which were properly notarized. It also now transpires that FAGAN also deposited signed copies of interrogatories answers in the mail which were sworn to under oath.] It is true, of course, that on that date the copies that were served were unconformed.

[The unconformance is a mere "irregularity" as will be set forth in a subsequent point.] Under the substantive law of the State of New York, since the demand for interrogatory answers was served by mail, once the answers are signed and sent in the mail compliance with the Order has been made. See, for example, Spratt vs. Paramount Pictures 35 NYS(2nd) 815 where the Court said:

> "* * * The theory is that the offeror, by using the mail as his agent to transmit the offer, has given the offeree implied authority to use the same agency to receive his reply. * * *"

See also Wester vs. Casein Co. of America, 206 NY 506

Federal Courts are bound by State substantive law under Erie Railroad Company vs. Tompkins 304 US 64; Guaranty Trust Co of NY vs. York 326 US 99; Cohen vs. Beneficial Industrial Loan Corp. 337 US 541; Ragan vs. Merchants Transfer & Warehouse Co. 337 US 530, Byrd vs. Blue Ridge Rural Electric Co-Operative, Inc. 356 US 525 and Hanna vs. Plumer 380 US 460.

Since it is conceded that, at the time of the mailing of the interrogatory answers of RANDOLPH (and now FAGAN) properly executed answers were in the mail going to the plaintiffs' attorneys, the service on the part of the plaintiffs of the copies of answers was proper and timely.

POINT FOUR

THE FAILURE TO CONFORM THE COPIES OF THE INTERROGATORY ANSWERS OF THE INDEPENDENT INVESTOR PROTECTIVE LEAGUE AND RANDOLPH IS A MERE IRREGULARITY AND NOT A FATAL DEFECT AND THE SERVICE OF THE ANSWERS IS IN ALL RESPECTS PROPER.

It is conceded that the copies of the RANDOLPH answers which were sent to the attorneys for TOUCHE ROSS were not conformed and that the copies of the answers of the INDEPENDENT INVESTOR PROTECTIVE LEAGUE did not have the jurat filled out.

In order to determine whether the service of such papers are sufficient we must turn to the substantive law of the State of New York.

The significant statutes are New York CPLR 2001 which reads as follows:

> " * * * At any stage of an action, the court may permit a mistake, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.* *"

It is conceded, in the present case, that the defendant TOUCHE ROSS was not prejudiced by any conduct of the plaintiffs. This appears on the transcript (JA 215) as follows:

> Q. Is there any way that your client has been prejudiced by the fact that these interrogatory answers came in ....
>
> THE COURT : I don't think that is an appropriate question for this.

The Courts of New York have held, consistently, that the omission of a jurat on documents is not a fatal defect. In Halpern vs. State Furniture Co., Inc. 61 NYS(2nd) 618 (619) the Court said:

> "* * * Also an omission to place upon the copy petition served the name of the notary, is not a jurisdictional defect.* * *"

In People ex Rel Fifth Ave & 37th Street Corp. vs. Miller, 261 App. Div. 550 the Court said:

> " * * * The form for the jurat is entirely blank and the notary failed to affix her signature thereto.* * * On the facts disclosed in this record the defect is not a fatal jurisdictional defect depriving the Court of all power to act * * *"

In Federal National Mortgage Association vs. Graham, 324 NYS (2nd) 827, the Court said:

> "* * * A substantial right of the defednants herein, not being prejudiced [by the failure to place a jurat on the documents] the Court may disregard such irregularities* * *"

Similar cases in New York are People vs. Miller, 282 NY 5 (failure of the party to sign the verification of a document is not fatal and can be corrected)

Even if the New York Rule were proceedural and not substantive the Federal Courts should still apply it since it does not conflict with any Federal Rule.

Miller vs. Davis, 507 Fed(2nd) 308 (1974) is the latest pronouncement on the subject. On page 314 of the opinion the Court held that a Federal Court must apply a State Procedural rule "which is intimately bound up with the substantive right or obligation being asserted."

To the same effect is Szantay vs. Beech Aircraft Corp. 349 Fed.(2nd) 60.

Thus, since service of copies of the RANDOLPH and INDEPENDENT INVESTOR PROTECTIVE LEAGUE interrogatory answers was made within the time set by the Court, even though they were somewhat irregular (no jurat filled in the the INDEPENDENT INVESTOR answers and no conformance of the RANDOLPH answers, they are sufficient under New York Law.) Hence there was no ground for Rule 37 sanctions against any party.

POINT FIVE

ON SEPTEMBER 5th 1974 THE PLAINTIFFS' ATTORNEYS HAD ALL OF THE INFORMATION NECESSARY TO ANSWER INTERROGATORIES. HENCE THEY COULD HAVE SENT COPIES VERIFIED BY THE ATTORNEY HAD THEY SO DESIRED

The record shows that as early as August 29th, 1974 the plaintiffs' attorneys had all of the information in their

possession necessary to answer the defendant TOUCHE ROSS' interrogatories. This is shown in the Motion for an Extension of time (JA 387-388). It would have been entirely possible for the plaintiffs' attorney to have verified the information involved under New York CPLR 3020(d) which reads in part as follows:

> "* * * if the party * * * is not within the county where the attorney has his office * * or if all the material allegations of the pleading are within the personal knowledge of * * the attorney, the verification may be made by such * * attorney."

This provision is also one of similar applicability to the provision set forth hereinabove under "[Point Four] and the Federal Court should apply it.

POINT SIX

DISMISSAL OF THE COMPLAINT AGAINST THE INDEPENDENT INVESTOR PROTECTIVE LEAGUE AND IMPOSITION OF RULE 37 SANCTIONS WAS NOT WARRANTED SINCE THERE WAS NO WILFUL REFUSAL TO MAKE DISCOVERY.

The determination of the District Judge in this matter is inconsistent. On the one hand the plaintiffs and their attorney are accused of failing to make discovery in accordance with an Order of the Court. On the other hand they are critized for serving copies of papers supplying information to the defendants.

This circuit will not dismiss a complaint or apply Rule 37 sanctions against a party only if the inability to comply with the Order involved is due to wilfulness or bad faith. In Flaks vs. Koegel, 594 Fed(2nd) 702, 2 Cir 1974 this Court said, on page 709 of the opinion, the following:

> "* * * We conclude that the challenged order below is only sustainable if it has been demonstrated that the defendants' failure to comply was in fact due to willfulness, bad faith, or fault and not to an inability to comply.* * *"

See also, Societe Internationale vs. Rogers, 357 US 197, GFI Computer Industries, Inc. vs. Fry 476 Fed.(2nd) 1, Grace vs. Fisher, 2 Cir, 355 Fed.(2nd) 21.

Let us consider the situation in the case at Bar. An order for further answers was issued August 16th, 1975. The individual plaintiffs reside at a considerable distance from where the undersigned has his office. A letter requesting information was sent promptly requesting the information. The information was received about August 29th, 1974. Prompt answers to interrogatories were sent to the parties involved. RANDOLPH replied on September 3rd, 1974 (within a few days after receiving the papers), FAGAN, it now appears, sent signed answers to the undersigned on August 30th, 1974 which should have reached the office long prior to September 5th, 1974.

SANDS executed answers for the INDEPENDENT INVESTOR PROTECTIVE LEAGUE on September 5th, 1974 which were served on that day. MICHAEL executed answers to interrogatories a few days later and these fully executed answers were in the possession of the defendant TOUCHE ROSS' attorneys prior to the hearing on the Rule 37 motion. MICHAEL, of course, was not even a plaintiff at that time and had no obligation to answer interrogatories.

Based upon all of these facts (which are conceded) the dismissal of the Complaint with prejudice by the District Judge is completely unwarranted and should be reversed.

POINT SEVEN

THE DISTRICT COURT HAD NO JURISDICTION TO MAKE THE ORDER ON APPEAL HEREIN SINCE PRIOR TO SUCH DETERMINATION NOTICES OF VOLUNTARY DISMISSAL WERE FILED UNDER RULE 41(a) WITH RESPECT TO ALL PLAINTIFFS

Prior to the making of the Order under appeal herein the plaintiffs filed a Notice of Vountary Dismissal with respect to the plaintiff RANDOLPH (JA 229-230). This Notice (even though not necessary, was duly signed by District Judge MacMahon. Thus, at the time of the "hearings" held by the District Judge [purportedly to inquire into the circumstances of the mailing of the RANDOLPH Interrogatory answers] the action

by RANDOLPH had already been voluntarily dismissed. The Court, in its opinion, also states that the action has been voluntarily dismissed with respect to MICHAEL and FAGAN. There were two Notices of Voluntary Dismissal filed for MICHAEL and FAGAN. The first (JA 231) was rejected by the defendant TOUCHE ROSS (JA 232-234) and the original notice does not appear in the Clerk's records (although it was duly served and filed). A second notice was sent, after the rejection by the defendant TOUCHE ROSS (JA 228) and this was presented to the Clerk of the Court on or about October 28th, 1974 (prior to the date of the "hearings" held by District Judge Owen). This notice was apparently sent to Judge MacMahon who signed the same on January 23rd, 1976.

The decisions of this Court, however, hold that a Notice of Voluntary Dismissal automatically terminates the litigation upon filing of the same with the Clerk of the Court. Judicial approval thereof is not necessary.

Scam Instrument Corp. vs. Control Data Corp., 458 Fed(2nd) 885 sets forth the general rule. On page 888 of the opinion the Court held as follows:

> "* * *If Scam was entitled to 41(a)(1)(i) procedure its voluntary dismissal automatically terminated the action upon filing of the dismissal with the clerk. No order of court was required * * *"

In Miller vs. Reddin, 422 Fed(2nd) 1264, a proceeding was pending in the District Court when the plaintiff attempted to file a Notice of Voluntary dismissal. The District Judge endorsed on the document the following:

> "Mr. Clerk, lodge this, do not file it. Do not enter a dismissal"

On appeal the Court of Appeals held as follows (pg. 1266:

> "* * * A voluntary dismissal by a plaintiff under Rule 41(a)(1) FRCP automatically terminates the action upon the filing of the dismissal with the clerk. No order of court is required.
>
> * * *
>
> The case is remanded to the district court. The clerk of the district court is instructed to file the voluntary dismissal heretofore lodged with the clerk, whereupon the action below will be by such act, dismissed * * *"

Similar cases are Sheldon vs. Amperex Electronic Corp., 449 Fed(2nd) 146, 2 Cir 1971; Nix vs. Fulton Lodge, 452 Fed.(2nd) 794; Hyde Construction Company vs. Koehring Company, 388 Fed(2nd) 501; American Cyanamide Co. vs. McGhee, 317 Fed. (2nd) 295; Plains Growers, Inc. vs. Ickes-Braun Glasshouses, Inc. 474 Fed(2nd) 250. Thus, at the time of the "hearings" held by the District Court, there had already been filed a Notice of Voluntary Dismissal with respect to the plaintiff RANDOLPH. Thus the litigation as to him was at an end and the District

Court had no jurisdiction to proceed further.

[In actuality, of course, the Notice of Voluntary Dismissal as to RANDOLPH was actually signed by District Judge Mac Mahon and was, in effect, AN ORDER OF THE COURT.]

A first Notice of Voluntary Dismissal as to MICHAEL and FAGAN was also filed (but appears to have been lost in the Court Records.)However a second Notice of Voluntary Dismissal as to all plaintiffs was filed on or about October 28th, 1974 and was eventually "so ordered" by Judge Mac Mahon. This Notice "relates back" to October 28th, 1974 so that the District Judge had no further jurisdiction in this case subsequent to October 28th, 1974.

The attempt by the District Court, in such a situation, to attempt to retain jurisdiction of this case was, in the light of the decisional law, completely improper and any Order entered by said District Court subsequent to the date of the filing of such Notice of Voluntary Dismissal was void.

The defendant TOUCHE ROSS, will undoubtedly try to argue that this action was commenced as a Class Action (although there was no Class Certification at the time of the filing of the Notices of Voluntary Dismissal). Since Class Actions cannot be dismissed without an Order of the Court, the defendant TOUCHE ROSS will claim that the Notices of Voluntary Dismissal were

ineffective. However, where an action has not yet been certified as a Class Action it can be so voluntarily dismissed (particularly when there are other Class Representatives making similar claims in other actions as occurred in this case.) In any event, of course, the Court approved all of the Notices involved.

POINT EIGHT

BY REASON OF THE ADMITTEDLY FALSE AFFIDAVIT FILED BY THE ATTORNEY FOR THE DEFENDANT TOUCHE ROSS AND THE LACK OF CANDOR DEMONSTRATED BY HIS TESTIMONY AND AFFIDAVITS AS WELL AS THE FALSE TESTIMONY WITH RESPECT TO THE ENVELOPE PRODUCED AND HIS FAILURE TO PRODUCE THE OTHER ENVELOPE, RULE 37 ATTORNEYS FEES ARE INAPPROPRIATE. IF SUCH FEES ARE TO BE AWARDED THEY SHOULD BE AWARDED TO THE PLAINTIFFS.

The District Court, in awarding attorneys' fees against the plaintiff INDEPENDENT INVESTOR PROTECTIVE LEAGUE and its attorney, proceeded under Rule37 FRCP which, in pertinent part, reads as follows:

> "(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust * * *"(emphasis supplied).

In making such award, of course, the Court must be guided by equitable principles including that of "unclean hands".

At the outset, the award of Rule 37 expenses is not justified unless the conduct is "wilful" and, in the case at bar, there has been no wilful refusal to make discovery. This point has been commented upon supra.

More importantly, however, is the fact that the attorney for the defendant TOUCHE ROSS made at least one admittedly false affidavit in this proceeding, attempted to mislead the Court in another affidavit and gave false testimony at the "hearing" held before the District Judge. These acts will be specifically set forth at this time.

In an affidavit filed September 17th, 1974 (JA 413-414) Mr. ENO (an attorney for the defendant TOUCHE ROSS) said:

> "* * * That letter contains a number of misstatements. Analysis of those misstatements simply confirms that there was in existence a deliberate effort to mislead counsel and the Court. Thus :
>
> (a) In his letter of September 11, 1974, Mr. Bader suggests that the copies of the purported answers of the individual plaintiffs were "inadvertently" mailed to us on September 5 by some unnamed person in his office. The fact is that those purported answers arrived in the same envelope with the answers of

IIPL. Appended to the answers of IIPL was a certification that on September 5, 1974 he mailed the copies of IIFL's answers to all attorneys (Exhibit G). The mailing was thus apparently by Mr. Bader and not by someone in his office. The excuse of "inadvertence" is thus without substance * * *" (emphasis supplied)

This affidavit was signed on September 16th, 1974 (JA 417) and was false and believed to have been deliberately false.

On November 14, 1974, after the Court had already commenced hearings on November 4, 1974, Mr. ENO admitted the falsity of this affidavit as follows (JA 212) as follows:

> "THE WITNESS: Now, your Honor, I would like to correct an inaccuracy that appears in one of my affidavits. In one of my affidavits I stated that the answers of these individual plaintiffs had come in the same envelope as the answers of Independent Investor Protective League. I had been given that information and I believed it to be true. I subsequently investigated it, and have come to the conclusion that there were two mailings, and I have located the envelope in which I think one or another of the individual answers came in. I can't testify as to whether all of them came in this envelope because this is the envelope in which one or the other of them arrived.* * *"

The envelope produced (Exhibit T (JA 599)is a small business envelope. It would be impossible for interrogatory

answers of the IIPL (JA 476-544) containing a total of sixty-eight (68) pages to have arrived in a small business envelope. ENO did not make the statement in the affidavit "on information and belief" but on personal knowledge. With the meticulous manner in which his office operates to have unaccountably "lost" the large manila envelope in which the IIPL answers arrived (as testified by him) is beyond belief.

Obviously, what really happened was that ENO knew, all along, and at least at the time of the November 4th hearing, that there were in fact two mailings. This, of course, would amply demonstrate the claim of "inadvertence" on the part of the plaintiffs' attorney and would "demolish" ENO's claim of a deliberate attempt to deceive. Thus, we submit, the said ENO wished to first obtain the testimony of BADER and SANDS. When it then appeared, without doubt, that there were, in fact, two mailings in two different envelopes, one large and one small, then, and only then, did ENO admit his "error". Obviously, also, he could not produce the large envelope which would clearly demonstrate the falsity of the affidavit so he conveniently "lost" it. However, he then had to state, to avoid disbelief on the part of the Court, that "he didn't know" in which envelope the individual answers arrived.

Further, in an affidavit sworn to January 4, 1975

(JA 605-606) the plaintiff RANDOLPH swore to the fact that he mailed signed answers to interrogatories to the undersigned attorney for the plaintiffs at 1PM on September 3rd, 1974 from a post-office in San Diego California.

In a replying affidavit of LAWRENCE R. ENO the following statement was made:

> "* * * My office has checked with the Post Office Department and has been advised that an air-mail letter deposited in a letter-box in San Diego California after 5:30 PM on September 3, 1974 would not have been delivered in New York on September 5, 1974. (emphasis supplied).

A more transparent attempt to mislead the Court (which apparently was successful) could hardly be imagined.

In the same affidavit ENO swore to the following:

> " * * * On the argument before the Court on September 20th, 1974 Mr. Bader made no statement that Mr. Sands had been in his office on September 9, 1974 * * *"

The Court's notes (JA 597) completely contradicts this and states:

> " knew on 9th that Sands said"

Such conduct on the part of an attorney is, it is submitted, ample justification to withhold the award of attorneys' fees and expenses under the equitable doctrine of "unclean hands". This is the only time, in the law, where

conduct of a party will preclude him from obtaining relief to which he otherwise would be entitled. While plaintiffs deny that the defendant TOUCHE ROSS is entitled to any relief in this matter, this conduct on the part of the attorney for such defendant precludes any relief being granted by the Court.

It is further interesting to note that while notice of all of these proceedings has been given to the attorneys for the other defendants, all of the other attorneys have not seen fit to participate in them.

POINT NINE

SINCE THE DISTRICT COURT MADE FACTUAL FINDINGS ON WHICH IT BASED ITS OPINION, PLAINTIFFS ARE ENTITLED TO A JURY TRIAL ON THE FACTUAL ISSUES IF THEY ARE MATERIAL.

In making the determination in which the District Court dismissed the Complaint of INDEPENDENT INVESTOR PROTECTIVE LEAGUE, and awarded expenses and attorneys' fees to the defendant TOUCHE ROSS, the Court made a number of factual findings. These, it is submitted, are "clearly erroneous" as will be demonstrated infra. However, since review of the factual findings of a Court can only be made if they are "clearly erroneous" a party demanding a Trial

by Jury is entitled to obtain this right where a substantial penalty is being imposed upon him or where his Complaint is being dismissed.

The failure of the Court to grant a Jury Trial in this case (although a Trial by Jury was duly demanded both in the original complaint and the amended complaint)is a Seventh Amendment violation.

The Seventh Amendment to the United States Constitution reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"

This Court has repeatedly held that in any case where a substantial penalty is to be imposed, a Jury Trial is mandatory. The latest case is United States vs. J. B. Williams Company, Inc., 2 Cir. 498 Fed(2nd) 414 (1974) where the Court said:

> (422) "* * There can be no doubt that in general there is a right of jury trial when the United States sues to collect a penalty,even though the statute is silent on the right of jury trial.
>
> * * *
>
> Many cases, arising under a broad range of other civilpenalty and forfeiture provisions, have reached the same conclusion * * *"

The Supreme Court has held that even in cases

of Criminal Contempt, a Jury Trial is required. In Bloom vs. Illinois, 391 US 194 (198) the Court said:

> " * * *Our deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution * *"

Many other cases holding that the right of jury trial is inviolate where serious sanctions are to be imposed upon a party and factual questions are involved are Curtis vs. Loether 415 US 189 (193) where the Court said:

> "* * * Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes * * *"

See also, Dairy Queen, Inc. vs. Wood, 369 US 469; Hepner vs. United States, 213 US 103; Fleitmann vs. Welsbach Street Lighting Co., 240 US 27; Atchison, Topeka & Santa Fe Ry vs. United States, 178 Fed.12; Porter vs. Warner Holding Co., 328 US 395; Texas & Pacific RR Co. vs. Rigsby, 241 US 33; Arnstein vs. Porter, 2 Cir. 154 Fed(2d) 464

Gnerally, of course, jury trial questions do not arise in Rule 37 sanction cases. Firstly the amounts awarded are generally small. Secondly there are generally no factual questions involved. The plaintiffs submit that, in this case,

even assuming arguendo that Rule 37 sanctions were appropriate a Jury trial on the factual issues was mandatory.

POINT TEN

IN VIEW OF THE FACT THAT THE DISTRICT COURT MADE FINDINGS OF UNPROFESSIONAL CONDUCT AND RECOMMENDED DISCIPLINARY ACTION AGAINST THE PLAINTIFFS' ATTORNEY A JURY TRIAL IS REQUIRED UNDER THE SIXTH AMENDMENT SINCE DISCIPLINARY PROCEEDINGS ARE QUASI-CRIMINAL IN NATURE

The Sixth Amendment to the United States Constitution reads as follows, in part:

> "* * *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * *"

In the instant case the District Judge made factual findings that the plaintiffs' attorney and the plaintiff IIPL's secretary gave false testimony and made false statements. This finding is used to support a recommendation for discipinary action against the plaintiffs' attorney.

Disciplinary proceedings are quasi-criminal in nature and this Circuit has repeatedly said so. For example, in Erdmann vs. Stevens, 2 Cir. 458 Fed(2nd) 1205 (1210) (1972) this court said:

> "* * * However, it cannot be disputed that for most attorneys the license to practice law represents their

> livelihood, loss of which may be a greater punishment than a monetary fine. * * * Furthermore , disciplinary measures against an attorney, * * * may threaten another serious punishment--loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, particularly if his branch of the law is trial practice. Undoubtedly these factors played a part in characterizing disbarment proceeding as quasi-criminal in nature. * * *"

In In Re Ruffalo, 390 US 544 (551) the Supreme Court properly condemmed the precise type of conduct of proceedings by the District Judge as carried out here. The Court held as follows:

> "* * * These are adversary proceedings of a quasi-criminal nature. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.* * *"

See also, Theard vs. United States, 354 US 278; Cole vs. Arkansas 333 US 196; In Re Jones 506 Fed(2d) 527; Burkett vs. Chandler 505 Fed(2d) 217 and Staud vs. Stewart, 366 Fed. Supp. 1398.

In these procedings an accused is entitled to the right of freedom to remain silent under self-incrimination provisions. See De Vita vs. Sills 422 Fed.(2nd) 1172

The mischief in this present situation is the fact that the Court has found that the plaintiffs' attorney has given false testimony and made false statements to deceive counsel and the Court. These findings would, of course, be binding on any other tribunal who would consider the matter. No notice was given to the plaintiffs' attorney that this was the question to be considered by the District Judge. The sole notice given, both by the Court and adverse counsel, was that the Court wished to inquire into the circumstances of the receipt by the undersigned of certain answers to interrogatories. Thus plaintiffs' attorney was unaware of the fact that serious questions of the professional ethics of the said attorney were being considered. Had this been made clear to the undersigned the following would have occurred.

1. Outside counsel would have been secured.

2. Investigators would have been employed to ascertain all of the facts.

3. The undersigned would not have continued as counsel for the plaintiffs in this case.

4. The undersigned might of asserted his right to remain silent on Fifth Amendment grounds.

These facts, of course, mandate that the factual issues involved herein be tried before a Jury and the Sixth Amendment is violated if this is not done.

POINT ELEVEN

THERE WERE PROCEDURAL IRREGULARITIES IN THE PROCEEDINGS BEFORE THE DISTRICT JUDGE MANDATING NEW HEARINGS ON THAT GROUND ALONE.

The District Judge made findings with respect to claimed statements that were made before him on September 20th, 1974 which are not supported by any stenographic transcript. This, of course, is prejudicial error since there is no record before an Appellate Court of the statements claimed to have been so made. It is on the record of these so-called statements that the District Judge bases the majority of his finding of claimed "false testimony". Furthermore the District Judge placed his handwritten notes of the matters that purportedly transpired on September 20th, 1974 before him and these notes are Court Exhibit S. Such conduct on the part of the District Judge prevents the proceeding from being a fair trial since the District Judge now becomes a "witness" in the proceeding and there is no independent record of what was actually said. [The notes of the District Judge are, in many places, illegible and the parties cannot, of course, cross-examine the District Judge on these items.]

In Querica vs. United States 289 US 466(469) the Supreme Court said:

> " * * * The judge conducting a jury trial in a federal court is not a mere moderator, but is the governor of the trial for the purpose of

assuring its proper conduct * * "

How much more important is it for a Judge to be completely impartial at a trial when he has the right to make fact findings which can only be reversed if "clearly erroneous".

In Glasser vs. United States 315 US 60 (82) the Supreme Court commented on the responsibilities of a District Judge in conducting proceedings before him as follows:

> "* * * Upon him [the District Judge] rests the responsibility of striving for that atmosphere of perfect impartiality which is so much to be desired in a Judicial Proceeding.* * *"

The conduct of the District Judge, in this proceeding, is, it is submitted, far from the requirements mandated by the Supreme Court and by Statute. Serious errors have occurred in the conduct of the proceedings below, and, if hearings are necessary in this case the matter must be returned for new hearings to determine the material facts.

POINT TWELVE

THE FACTUAL FINDINGS OF THE DISTRICT JUDGE WERE CLEARLY ERRONEOUS. THERE ALSO WAS NO FALSE TESTIMONY GIVEN BY THE PLAINTIFF IIPL OR ITS ATTORNEY IN ANY MATERIAL MATTER.

Federal Appellate Review of factual findings is generally subject to the "clearly erroneous" test. The

fact findings here clearly are "clearly erroneous". Firstly, of course, in view of the findings of the District Judge, and the reference of the matter to the Chief Judge for possible disciplinary action, and his findings of "false statements" and "false testimony" the standards are not "findings supported by a preponderance of the evidence" but findings "beyond a reasonable doubt". Here the findings made are not even supportable by a "preponderance of the evidence".

At the outset, as the undersigned has previously pointed out in prior points, even assuming arguendo that the copies of answers were sent deliberately, there were properly signed copies of these answers in the mail at the time (with the exception of the said GARY MICHAEL whose answers were mailed a few days later. MICHAEL, of course, was not a party to this suit and his answers were, in effect, nullities.

The finding that the answers of the IIPL were not executed on September 5th, 1974 is based upon the testimony of DOROTHY BLACKER that she normally placed a date on the documents that she typed as the current date and that, in this instance, she did not remember being told to place any other date on the document. She did not, of course, testify that she actually typed the documents on September 5th but just "did not remember". Both BADER and SANDS testified that the document was signed on the morning of September 5th, 1974.

Also, of course, the subject matter of the hearing did not deal with the IIPL answers and, as to those, even adverse counsel conceded that they were signed and notarized on September 5th, 1974. Thus, at least with respect to this factual finding, it is "clearly erroneous" and must be set aside.

RANDOLPH concededly signed his answers on September 3rd, 1974 (at least two days before they were due). He placed them in the mail at 1PM on that date in a San Diego Post Office. Under normal transmission patterns they would have been received at the office of the plaintiffs' attorneys on the morning of September 5th, 1974. SANDS testified that he saw these answers in BADER's office at 4PM on September 5th, 1974. The mail deliverer, LA PORTA, has now submitted an affidavit to the effect that the mail on that day was given to a receptionist at BADER's office.

Based upon this evidence there is no question that the RANDOLPH interrogatory answers were in the office of the Plaintiffs' attorney on September 5th, 1974 and the findings of the Court to the contrary are "clearly erroneous".

CONCLUSION

THE ORDER AND OPINION OF THE DISTRICT COURT IMPOSING RULE 37 COSTS AND ATTORNEYS FEES UPON THE PLAINTIFF

INDEPENDENT INVESTOR PROTECTIVE LEAGUE AND ITS ATTORNEY I.WALTON BADER SHOULD BE IN ALL RESPECTS SET ASIDE.

Respectfully submitted

I. Walton Bader

I.Walton Bader
Attorney for Appellants

BADER & BADER Lewis v. Teleprompter

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 30 day of March 1976 deponent served the within Brief upon:

Rosenman, Colin, etc.

attorney(s) for

Appellee

in this action, at

575 Madison Avenue
NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 30
day of March, 1976.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977